
A questionable “missing” balance between the right to repatriation and the foreign fighters according to the interpretation of the ECtHR

Peter Knapp

DOI: [10.5281/zenodo.8268982](https://doi.org/10.5281/zenodo.8268982)

Follow this and additional works at:

<https://inteulm.free.nf/index.php/inteulm/issue/view/2>

Recommended Citation

Knapp, P. (2023). A questionable “missing” balance between the right to repatriation and the foreign fighters according to the interpretation of the ECtHR. *International and European Union Legal Matters (INTEULM)*, vol. 1, n. 1, 5-72, Article 1

Available at:

<https://inteulm.free.nf/index.php/inteulm/issue/view/2>

This article is brought to you for free and open access by CEIJ. It has been accepted for inclusion in International and European Union Legal Matters (INTEULM). For more information, please contact: inteulm@gmail.com

A questionable “missing” balance between the right to repatriation and the foreign fighters according to the interpretation of the ECtHR

Peter Knapp, Ph.D, Germany, post Ph.D at Clark University.
Department of Government and International Relations, US.

Abstract: The right to “return” according to Article 3, par. 2 of the protocol no. 4 of the European Convention of Human Rights has been addressed with various nuances up to now by the jurisprudence of the European Court of Human Rights. In our paper, the completed investigation followed a more precise path based on the H.F. and others v. France case of 2022 trying to deepen the protection of some fundamental rights and especially the relationship with foreign fighters, the policy against Islamic terrorism and the protection of minors. Has a budget been found for the protection of these rights? What happens with individual

or collective rights as well as with the protection against ISIS terrorism? Finally, who has state responsibility? These are some of the questions that this paper seeks to resolve and shed light on.

Keywords: ECtHR; ECHR; protection of human rights; counter-terrorism strategy; right of return; foreign fighters; protection of minors.

Introduction

“(...) No one shall be deprived of the right to enter the territory of the State of which he is a citizen (...)” pre-established the ECtHR in the *H.F. and others v. France* case regarding the repatriation of two French citizens who were detained with their minor children in a camp in Syria. This is an innovative and different interpretation of art. 3, par. 2 of the Protocol no. 4 of the ECHR (Rainey, Wicks, Ovey, 2021)¹. In the same case the ECtHR stated that:

¹ECtHR, *Vittorio-Emanuele di Savoia v. Italy* of 24 April 2004.

“(…) opportun de saisir l’occasion fournie par les présentes affaires pour examiner la portée de l’article 3 §2 du Protocole no 4, y compris au regard des droits procéduraux des intéressés et/ou des obligations procédurales correspondantes de l’État dans le contexte d’un refus de rapatriement (...)” (Pijnenburg, 2022)².

The expressions used by the ECtHR show that they have tried to solve some important problems such as for example the issue of the extraterritorial jurisdiction of the French State according to Article 1 ECHR given that a State may be liable for acts or omissions attributable to its jurisdiction. On the other hand Article 3, par. 2 of the Protocol no. 4 (Sudre, 2021) has introduced its own power/right to repatriation in relation to the obligations that are part of the State, obligations waived in the face of exceptional circumstances such as guarantee measures and, control over the decisions that are accepted by the State.

It is a ruling with many points under discussion such as the “déchéance de la nationalité” and the “théorie des actes de gouvernement”. We are not so interested in this but also art. 3, par. 2 of Protocol no. 4 is connected with the general reasoning

²ECtHR, H.F. and others v. France of 14 September 2022, par. 155.

of the ECtHR which has perhaps sought a balance through the protection of public safety, the protection of the human rights of subjects who are accused of terrorism and their families, especially for minors. In fact and in law, there are passages in the decision that focus even more on the phenomenon of foreign fighters as a type of repatriation policy within the EU and in our case from France, so that we have noticed many references to families of the fighters (Arielli, 2020).

It was a family unit for two women who came from Syria with their children to France to join their husbands³. They were captured by the Syrian Democratic Forces (SDF) located in the Al-Hol camp (Schmidiger, 2018)⁴. A camp that gathered people of Syrian or Iraqi nationality, as well as citizens of third countries

³ECtHR, H.F. and others v. France, op. cit., par.11.

⁴ECtHR, H.F. and others v. France, op. cit., par. 14. UN Office for the Coordination of Humanitarian Affairs (OCHA), Report of the Independent International Commission of Inquiry on the Syrian Arab Republic (A/HRC/51/45): <https://reliefweb.int/report/syrian-arab-republic/report-independent-international-commission-inquiry-syrian-arab-republic-ahrc5145-enarruzh>).

together with their families⁵.

France from 2019 to 2021 has started an individual repatriation (cas par cas) of minors and their families⁶. However, the daughters and grandchildren of the applicants who were among the persons involved in these proceedings were not included⁷. The appellants first turned to the Foreign Ministry (MEAE) and the President of the Republic and then to the national judge and the Conseil d'État⁸. The French Conseil d'État did not grant the applicants' relevant request on the basis of a lack of jurisdiction⁹.

5OCHA, Syria: Humanitarian Response in Al-Hol camp, Situation Report No 4, 29 May 2019: <https://reliefweb.int/report/syrian-arab-republic/syria-humanitarian-response-al-hol-camp-situation-report-no-4-29-may> OCHA, Syria | Flash Update #7, Humanitarian impact of the military operation in north-eastern Syria, 16-18 October 2019: <https://reliefweb.int/report/syrian-arab-republic/syria-flash-update-7-humanitarian-impact-military-operation-north>.

6See the Instruction interministérielle n. 5995/SG relative à la prise en charge des mineurs à leur retour de zone d'opérations de groupements terroristes (notamment la zone irako-syrienne), 23 February 2018: <https://www.legifrance.gouv.fr/circulaire/id/43128#:~:text=L'instruction%20organise%20la%20prise,et%20%C3%A0%20leur%20situation%20individuelle>

7ECtHR, H.F. and others v. France, op. cit., par. 28.

8ECtHR, H.F. and others v. France, op. cit., par. 44, 47.

9ECtHR, H.F. and others v. France, op. cit., par. 53.

The ECtHR theorized that this decision was based on the “*théorie des actes de gouvernement*” in relation to acts that cannot be challenged before the courts. Parents of French nationals who were detained in Syria filed an appeal with the ECtHR against France, i.e. they filed two appeals which were later merged into one¹⁰.

Legal qualification of foreign fighters and EU law

Foreign fighters are affirmed (Flores, 2016; Metodoeva, 2018)¹¹ mostly by the doctrine as:

“(...) individual(s) who leave their country of origin or habitual residence to join a non-state armed group in an armed conflict abroad and who [are] primarily motivated by ideology, religion, and/or kinship (...)” (Krähenmann, 2014).

¹⁰The appeal was filed on 6 May 2019, while a second appeal was filed on 7 October 2020. The four applicants are based on the defendant state's refusal to repatriate their daughters and grandchildren who are being held as detainees in a northern cape-East of Syria. They are based on Article 3 ECHR, Article 8 ECHR, Article 3, par. 2 of the Protocol no. 4 ECHR, Article 13 and 3, par. 2 of the Protocol no. 4 ECHR.

¹¹Foreign (terrorist) fighter estimates: Conceptual and data issues. The Hague: International Centre for Counter-Terrorism (ICCT), n. 4/2015: [ICCT-Schmid-Foreign-Terrorist-Fighter-Estimates-Conceptual-and-Data-Issues-October20152.pdf;](#)

Their figure is connected with the phenomenon of international religious terrorism (Bilkova, 2018; Widagdo, Indrayanti, Saraswati, 2021). Let us not forget that as soon as the conflict in Syria began, many Europeans went to fight alongside the Syrians based on humanitarian law and political reasons¹². We do not know when the foreign fighters went to Syria as well as the reasons of humanity that respect the number and presence of such people (Lorne Dawson, 2021).

Obviously the moments were different and Syria came to the proclamation of a Caliphate as a buffer also for other reasons in the area (Bergema, San, 2019). Perhaps the foreign fighters from the United States are located in different areas and arrived at two different times in Syria. The reasons were different for them to travel to Syria (Hegghammer, 2016; Basra, Neumann, 2016; Neumann, 2016). For some, the reasons were the solidarity with the Syrian people, thus verifying the fight against the Syrian civil war (Neuwmann, 2016), for some others religious and ideological

¹²Center for Security Studies, Foreign Fighters: An overview of responses in eleven countries, Zurich, March 2014.

for the proclamation of the relative Caliphate.

The first motivation for these “movements” was solidarity and political and military control in the area as a new type of humanitarian intervention perhaps different from that of the past but increasingly present in our days in times of conflict (Coolsaet, 2016). The first group of fighters has been characterized as “(...) an extension of the “inner-city” gang phenomenon (...)” (Cruickshank, 2015).

In practice it was seen that the related Syrian conflict and the work of ISIS represented an active channel of delinquency (Coolsaet, 2016)¹³. Within this spirit we note a second group of

¹³See ex multis: International Crisis Group (2019). Women and children first: Repatriating the westerners affiliated with ISIS. <https://www.crisisgroup.org/middle-east-north-africa/eastern-mediterranean/syria/208-women-and-children-first-repatriating-westerners-affiliated-isis>. OCHA (2020). Syrian Arab Republic, North East Syria: Al Hol camp as of 11 October 2020 (“Al Hol Snapshot”). <https://reliefweb.int/report/syrian-arab-republic/syrian-arab-republic-north-east-syria-al-hol-camp-11-october-2020>. Human Rights Watch (2020). “Bring me back to Canada”: Plight of Canadians held in Northeast Syria for alleged ISIS links. <https://www.hrw.org/report/2020/06/29/bring-me-back-canada/plight-canadians-held-northeast-syria-alleged-isis-links>. Human Rights Watch (2020). Bring me back to Canada: Plight of Canadians held in Northeast Syria for alleged ISIS links. <https://www.hrw.org/report/2020/06/29/bring-me-back-canada/plight->

crime from vulnerable, excluded, isolated individuals who were looking for an active role in an area that was easy to acquire¹⁴.

Foreign fighters are inspired by various religious motivations as noted:

“(...) the specific motivations behind individual departures may

[canadians-held-northeast-syria-alleged-isis-links](#) OCHA (2020). Syrian Arab Republic, North East Syria: Al Hol camp as of 11 October 2020 (“Al Hol Snapshot”). <https://reliefweb.int/report/syrian-arab-republic/syrian-arab-republic-north-east-syria-al-hol-camp-11-october-2020>. Rights and Security International (2020). Europe’s Guantanamo: The indefinite detention of European women and children in North East Syria. <https://www.rightsandsecurity.org/impact/entry/europes-guantanamo-report>. OCHA (2021). Statement by under Secretary-General for humanitarian affairs and emergency relief coordinator, Mark Lowcock, on Syria: <https://reliefweb.int/report/syrian-arab-republic/under-secretary-general-humanitarian-affairs-and-emergency-relief-115>. Human Rights Watch (2020). “Bring me back to Canada”: Plight of Canadians held in Northeast Syria for alleged ISIS links. <https://www.hrw.org/report/2020/06/29/bring-me-back-canada/plight-canadians-held-northeast-syria-alleged-isis-links>. Rights and Security International (2020). Europe’s Guantanamo: The indefinite detention of European women and children in North East Syria. <https://www.rightsandsecurity.org/impact/entry/europes-guantanamo-report>. UNICEF (2021). Two children killed in Al-Hol Camp in Syria. <https://www.unicef.org/press-releases/two-children-killed-al-hol-camp-syria>. OHCHR (2021). Syria: UN experts urge 57 States to repatriate women and children from squalid camps. <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26730>. France 24 (2021). Syria Kurds launch security sweep, arrests in camp for IS families:

vary, ranging from genuine, though often naive, altruism to egotistical narcissism (...) (however) the role of religion should not be underestimated (...)” (Schmid, Tinnes, 2015).

And the question for someone who doesn't know the area is whether these people are victims or organizational leaders of an endless crime in the relevant area. We do not have an exact answer (Zubeda, Davies, 2016) as well as we do not know the role that foreign fighters actually represent (Hegghammer, 2010; Malet, 2013; Bakke, 2014; Moore, 2015; Bilková, 2018; Byman, 2019).

The United Nations took a position through the related resolution from the Security Council adopted early in 2014 and based on UN Charter VI stating that:

“(...) acute and growing threat posed by foreign terrorist fighters, namely individuals who travel to a State other than their States of residence or nationality for the purpose of the

<https://www.france24.com/en/live-news/20210328-syria-kurds-launch-security-sweep-arrests-in-camp-for-is-families>

14According to Coolsaet: “(...) the second group is more fuzzy and is composed of individuals with widely varying personal, age-related motivations (...)”.

perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, including in connection with armed conflict (...)”¹⁵.

In the same context, we also recall the positions that have emerged since October 2014 from EU for the fight against international terrorism.

It was the period in Europe, after the attacks in Paris (in 2015), where the European fighting spirit against terrorism was very active and defined as “(...) a multidimensional nature of the foreign fighters phenomenon (...)” (Cuyckens, 2021). The prevention of radicalization and the strengthening of the system of repression of terrorist acts¹⁶ have been addressed through the Directive n. 541 of 2017¹⁷ but also from the second recital of the

¹⁵United Nations Security Council Resolutions (UNSCRs) 2178, 2: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N14/547/98/PDF/N1454798.pdf?OpenElement>. See also the previous Resolution n. 2170:

<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N14/508/50/PDF/N1450850.pdf?OpenElement>.

¹⁶See, <https://data.consilium.europa.eu/doc/document/ST-14276-2016-INIT/en/pdf>

¹⁷See, Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA, OJ L 88, 31.3.2017, p. 6-21.

Directive 2017/547 which states:

“(...) the crucial role of foreign fighters in the rapid evolution of the terrorist threat underlining how foreign terrorist fighters returning home represent an increased threat to the security of all Member States (...)”¹⁸.

In this spirit, the repatriation of foreign fighters remains active and above all after the defeat of ISIS from the United States in 2019 and the return of foreign fighters to countries of origin where the main issues are discussed both at a European and international level, not arriving however to exact answers (Lopes, Dukin, 2019; Vinopal, 2019; Widagdo, Indrayanti, Saraswati, 2021).

Adoption policies towards fighters are developed and solicited within the human rights protection system (Duffy, 2018; Scherrer, 2018). Therefore, it has been stated that foreign terrorist fighters exist both the risk for collective security and the potential infringement of the right to security of individuals as

¹⁸See Recital 2 of the Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA, op. cit.

well as the return of foreign fighters and their families to the Continent as a threat to security (Rigotti, Barboza, 2021). As a result, the EU has adopted measures or requested national interventions aimed at guaranteeing the protection of European citizens through a strengthening of border controls¹⁹ and an increase in criminal sanctions²⁰.

The measures taken at the national level of the European Member States have remained quite “against” certain returns (Mehra, Paulussen, 2019). The general renunciation of identifying the legal discipline at every national and international level forces foreign fighters and their families to face the consequences and their choices in the individual responsibility of each participant

19Directive (EU) 2016/681 of the European Parliament and of the Council of 27 April 2016 on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime, OJ L 119, 4.5.2016, p. 132–149. Regulation (EU) 2017/458 of the European Parliament and of the Council of 15 March 2017 amending Regulation (EU) 2016/399 as regards the reinforcement of checks against relevant databases at external borders, OJ L 74, 18.3.2017, p. 1-7.

20Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 about combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA, OJ L 88, 31.3.2017, p. 6–21.

and not in a general state responsibility. Perhaps it was a road that stayed away from punishment under Chapter VII of the UN Charter. Whether it is domestic, national, European or international punishment, the problem remains the same, namely the difficulty of finding evidence to punish this type of “contemporary combat phenomena” (Mehra, 2017; Dworkin, 2019; Mehra, Paulussen, 2019; Cuyckers, 2021; Lu Philips, 2021).

Domestic law: From terrorist association to “déchéance de la nationalité”

France was one of the first European countries that tried to take a position in the repatriation of foreign fighters especially as a response to the continuous attacks on the national territory (Chemel, 2021). We immediately recall law n. 1510 of 30 October 2017 entitled: “Renforçant la sécurité intérieure et la lutte contre le terrorisme (SILT)”. Against the criminal law of the enemy in the face of the state of emergency and against terrorism

(Cahn, 2016) there is a tendency towards protection between criminal and administrative law (Alix, Cahn, 2017; Alix, 2017). The French Code Pénal has characterized itself as a legislative frenzy since it has introduced cases that respond criminally to some particularities of the forms of international terrorism (De Lamy, 2017)²¹. In particular we recall Article 421 par. 2, sub-par. 1 which punishes: “(...) l'association de malfaiteurs en relation avec une entreprise terroriste (AMT)” (Blisson, 2017; Weill, 2018)²². The individual contributes materially to the commission and execution of the terrorist act, i.e. to the simple “participation”

21According to De Lamy: “(...) Le législateur mène en effet une politique pénale consistant, non seulement, à incriminer le terrorisme dans ses manifestations violentes, mais également à en isoler les auteurs en punissant les soutiens qui leur sont apportés 1 et en saisissant les manifestations anticipées de cette forme de criminalité (...)”.

22According to Blisson: “(...) montée en puissance de l'association de malfaiteurs, depuis le recours à l'infraction de droit commun, sa consécration en infraction autonome terroriste par la loi du 22 juillet 1996, la création par la loi du 9 mars 2004 du crime de direction ou organisation d'une AMT, puis par la loi du 23 janvier 2006 d'une version criminelle de la participation à l'AMT, l'invention d'une version individuelle par la loi du 13 novembre 2014, jusqu'à l'aggravation de la répression par la loi du 21 juillet 2016 (...)”.

in the association²³. The risk is that such a fluid definition could be declined by jurisprudence in order to introduce a tightening of penal policy (Blisson, 2018). Such reasoning, it has been seen as the result of an “intention putative résultant d'une interprétation hasardeuse” (Poncela, 2016).

What is amazing in this code and the related punishment crimes is the specificity of rules of an administrative nature which clearly have the objective of limiting individual freedoms and the competence of the administrative judge to a role of strengthening towards the possibility of applying the guarantees of a criminal proceeding that is not so narrow but an insurance of the French national life²⁴.

With the law n. 731 of 2016 introduced Article 225, par.1 of the

23Article 421, par. 2, sub-par. 1 affirms that: “(...) Constitue également un acte de terrorisme le fait de participer à un groupement formé ou à une entente établie en vue de la préparation, caractérisée par un ou plusieurs faits matériels, d'un des actes de terrorisme mentionnés aux articles précédents (...)”.

24According to Article 66 of the Constitution of 4 October 1958: “(...) Nul ne peut être arbitrairement détenu. L'autorité judiciaire, gardienne de la liberté individuelle, assure le respect de ce principe dans les conditions prévues par la loi (...)”.

Code de la sécurité intérieure (CSI): Renforçant la lutte contre le crime organisé, le terrorisme et leur financement, et améliorant l'efficacité et les Garanties de la procédure pénale. It is a discipline that offers the possibility to forms of administrative control to subjects who have left the domestic territory with the ultimate goal of joining foreign terrorist groups where their return represented a precise threat to public safety, reaching a three-year prison sentence and fines of 45,000 Euros²⁵. The aim of this law was to show the relative severity of the State in the face of terrorist attacks and people who are at odds with their repatriation²⁶.

25Article 225, par.1 affirms that: “(...) Toute personne qui a quitté le territoire national et dont il existe des raisons sérieuses de penser que ce déplacement a pour but de rejoindre un théâtre d’opérations de groupements terroristes dans des conditions susceptibles de la conduire à porter atteinte à la sécurité publique lors de son retour sur le territoire français peut faire l’objet d’un contrôle administratif dès son retour sur le territoire national (...)”.

26See ex multis, Conseil constitutionnel, decision n. 2003-467 DC of 13 March 2003: “(...) de nécessité impérieuse pour la sauvegarde de l’ordre public, notamment pour prévenir, de façon temporaire, un péril grave et imminent (...)”. Conseil d’État, order n. 449743 of 12 March 2021; order n. 442581 of 18 August 2020 and order n. 45927 of 28 January 2020.

The notion of the “déchéance de la nationalité”, i.e. the loss of citizenship (Weil, 2005; Gibney, 2013; Lègier, 2014a; Lègier, 2014b) is connected with Article 25 of the Civil Code which states:

“(…) individu qui a acquis la qualité de Français peut, par décret pris après avis conforme du Conseil d’État, être déchu de la nationalité française” in various cases, among which is the conviction “pour un acte qualifié de crime ou délit constituant une atteinte aux intérêts fondamentaux de la Nation ou pour un crime ou un délit constituant un acte de terrorisme (...)”²⁷.

Obviously, the loss of citizenship needed a definitive sentence in the criminal court. The déchéance aims to combat acts of international terrorism (Sureau, 2011; Lepoutre, 2018a), as well as against individuals who are convicted of the crime of AMT (Macq, 2021)²⁸. In the form of a clause, institution or not, it has

27According to art. 25-1 affirms that: “(...) La déchéance n’est encourue que si les faits reprochés à l’intéressé et visés à l’article 25 se sont produits antérieurement à l’acquisition de la nationalité française ou dans le délai de dix ans à compter de la date de cette acquisition. Elle ne peut être prononcée que dans le délai de dix ans à compter de la perpétration desdits faits. Si les faits reprochés à l’intéressé sont visés au 1° de l’article 25, les délais mentionnés aux deux alinéas précédents sont portés à quinze ans (...)”.

28See: Conseil d’État, decisions n. 251299 of 18 June 2003, n. 301145 and n. 301967 of 26 September 2007, n. 383664 of 31 October 2014, n. 383664 of 11 May 2015 and the last n. 455395 of 22 June 2022.

been addressed in various forums (Geisser, 2015; Rongè, 2015)²⁹ and has found a positive legal basis in the Conseil constitutionnel in relation to Article 25 (Catelan, 2015; Lagarde, 2015; Chassang, 2015)³⁰. The Conseil Constitutionnel is based on an old decision of 16 July 1996 establishing that the legislator can make use of the relevant institution of the *déchéance* against naturalized citizens as: “(...) compte tenu de l'objectif tendent à renforcer la lutte contre le terrorisme (...)”³¹.

29“(…) [l]’élargissement des cas de *déchéance* de nationalité française (...) en outre à renforcer la protection de la société française, en permettant notamment de procéder à l’éloignement durable du territoire de la République, par la voie de l’expulsion, des personnes dont le caractère dangereux est avéré par la condamnation définitive dont elles ont fait l’objet et à interdire leur retour sur le territoire (...)”. Dossier législatif sur le projet de loi constitutionnelle de protection de la nation: https://www.assemblee-nationale.fr/14/dossiers/protection_nation.asp.

30See Conseil constitutionnel in the relevant decision n. 2014-439 QPC of 23 January 2015.

31Conseil constitutionnel, decision n. 2014-439 QPC of 23 January 2015, recital 13. Conseil constitutionnel in decision n. 93-325 DC of 12-13 August 1993: Loi relative à la maîtrise de l’immigration et aux conditions d’entrée, d’accueil et de séjour des étrangers en France: “(...) Considérant qu’aucun principe non plus qu’aucune règle de valeur constitutionnelle n’assure aux étrangers des droits de caractère général et absolu d’accès et de séjour sur le territoire national; que les conditions de leur entrée et de leur séjour peuvent être restreintes par des mesures de police administrative conférant à l’autorité publique des pouvoirs étendus et reposant sur des règles

According to the position of the Conseil constitutionnel, there can be no doubt that the *déchéance*:

“(…) ends up representing a measure that is anything but symbolic (…) due to its impact on the right to have a citizenship. Here we want to place the emphasis once again on the “right” to repatriation (…) through the *déchéance*”³².

Its position has been transformed into a means of keeping individuals considered dangerous from the national territory, i.e. comparable to the figure of exile (Lepoutre, 2018b).

The norms of international and European law aimed at guaranteeing the protection of fundamental rights that can be applied to *dechéance*. The need for this option is to assess the non-arbitrariness of this measure in the light of the existence of a

spécifiques; que le législateur peut ainsi mettre en œuvre les objectifs d'intérêt général qu'il s'assigne; que dans ce cadre juridique, les étrangers se trouvent placés dans une situation différente de celle des nationaux; que l'appréciation de la constitutionnalité des dispositions que le législateur estime devoir prendre ne saurait être tirée de la comparaison entre les dispositions de lois successives ou de la conformité de la loi avec les stipulations de conventions internationales mais résulte de la confrontation de celle-ci avec les seules exigences de caractère constitutionnel (...)” (Recital 2).

32ECtHR, *Naumov v. Albania* of 4 January 2015.

legal basis, the respect of a due process of law, the pursuit of a legitimate objective, and the proportionality of the measure with respect to this objective (Villiger, 2023)³³.

The topic is, in other words, connected with the compatibility of anti-terrorism measures and fundamental rights in the choice of state measures, also reaching Article 3, par. 2 of Protocol no. 4 ECHR (South, 2021).

Foreign Fighters and counter-terrorism strategy. How is formed the return policy?

As we understood in the previous paragraphs, the counter-terrorism strategy is connected with the guarantee of human rights. Foreign fighters and their families including minors represent many problems (Saul, 2019). The biggest problem is however public safety. A clear program of repatriation would indicate a recognition of the “likeness” of these “foreign fighters”

33ECtHR, K2 v. United Kingdom of 7 February 2017. Ghoumid and others v. France of 25 June 2020, par. 19. Usmanov v. Russia of 20 December 2020, par. 54. Hashemi and others v. Azerbaïdjan of 13 January 2022, par. 47.

and their belonging to national community. On the contrary, a refusal or reluctance for them to come back points in the opposite direction, that of a clear difference between “us” and “them” (Mathieu, 2022).

We can speak of an outsourcing policy based on the fear that foreign fighters represent a danger to national security as well as the parallel willingness to judge subjects of sensitive particularity abroad (Holman, 2016; Jawaid, 2017; Pokalova, 2019; Bures, 2020). This solution attempts to respect first of all the sovereignty of the States and the judicial institutions that are declared competent to judge foreign fighters (Bilková, 2018)³⁴, i.e. a type of choice that underlines the extraneousness of foreign fighters from citizens. Perhaps we can speak for a lesser responsibility of the French state in front of the figure of terrorists as well as the basis of a broader interpretative logic of the “déchéance de la nationalité” (Saas, 2016).

³⁴Ministère de l'Europe et des Affaires Étrangères (2019, August, 19): Combattants terroristes-Q&R-Extrait du point de presse: [Combattants terroristes - Q&R - Extrait du point de presse \(23.08.19\) - Ministère de l'Europe et des Affaires étrangères \(diplomatie.gouv.fr\)](https://diplomatie.gouv.fr/fr/combattants-terroristes-q-r-extrait-du-point-de-presse-23-08-19)

Repatriation after 2019 in France changes for minors and their families (Malbrunot, 2019). The goal was to divert uncontrolled immigration to France based on public security and repatriation control by guaranteeing a right of return to France (Kington, 2019; OSCE, 2020; Charbord, Birker, Taylar, Foa, Crespín, 2020; Cools, 2020; Stroobants, 2021; De Groot, Franssen, Harvey, Pougnet, 2021). The decision in respect of some French citizens carried out the relative repatriation operations to their own country awaited the French government itself. Let us not forget that the identification of the criteria makes it possible to evaluate the arbitrariness of state choices in relation to the “déchéance” institution. Within this context the ECtHR was based to judge the H.F. and others v. France case³⁵.

³⁵ECtHR, Lambert and others v. France of 24 August 1998, par. 148: “(...) un tiers peut, dans des circonstances exceptionnelles, agir au nom et pour le compte d’une personne vulnérable s’il y a un risque que les droits de la victime directe soient privés d’une protection effective et en l’absence de conflits d’intérêts entre cette victime et le requérant auteur de la requête (...)”.

H.F. and others v. France case. Criteria for identification, jurisdiction and application of Article 1 ECHR

Starting from the necessary obligation that France should guarantee the freedoms established by the ECHR in a “fractionnée et adaptée” manner, as a main circumstance for understanding whether a State such as the French burdens the obligation to guarantee the freedoms of the Convention³⁶. Evaluating Article 3, par. 2 of Protocol no. 4 opens the discussion of extraterritorial jurisdiction³⁷. According to Article 1 ECHR³⁸ the ECtHR identified the jurisdiction of the state party to the treaty. What interest us is the territorial criterion (Sudre, 2021)³⁹, in exceptional circumstances even outside national borders⁴⁰. The

36ECtHR, *Al-Skeini and others v. United Kingdom* of 7 July 2011, parr. 133-137. *Bankovic and others* of 12 December 2001, par. 75.

37ECtHR, *H.F. and others v. France*, op. cit., parr. 189-190.

38CICR, *Commentaire de la première convention de Genève*, Art. 1, parr. 143-183, 2020:<https://ihl-databases.icrc.org/applic/ihl/dih.nsf/INTRO/365>. See also: ECtHR, *Catan and others v. Republic of Moldova and Russia* of 19 October 2012, par. 103.

39ECtHR, *Ukraine v. Russia (Crimea)* of 16 December 2020, par. 344. *Gentilhomme and others v. France* of 14 May 2002, par. 22ss.

40ECtHR, *H.F. and others v. France*, op. cit., par. 185. *M.N. and others* of 5

identification of extraterritorial state jurisdiction is conceived as a model of *ratione loci* and *personae* (Spadaro, 2021; Villiger, 2023).

In particular, the *ratione loci* requires the specific form of jurisdiction and the effective control in the area that is located outside the national territory (Villiger, 2023)⁴¹. On the other hand, for the *ratione personae*, the purpose of the acts of state bodies that address outside the national territory also include diplomatic agents (Villiger, 2023)⁴². The ECtHR ruled out the effective control over the territory of North-East Syria as an exceptional circumstance even in the case of the applicants⁴³. If we admit that these circumstances can be characterized as

May 2020, parr. 101-102. *Georgia v. Russia (II)* of 21 January 2021, par. 82ss.

⁴¹ECtHR, *Bankovic and others v. Belgium*, op. cit., par. 70. *Ilaşcu and others v. Moldavia and Russia* of 8 July 2004. *Jaloud v. Olanda* of 20 November 2014, par. 139.

⁴²ECtHR, *Al-Skeini and others v. United Kingdom* of 7 July 2011, parr. 131-140. *M.N. and others*, op. cit., par. 107. *Güzelyurtlu and others v. Cyprus and Turkey* of 29 January 2019, parr. 188, 190 and 192-196.

⁴³ECtHR, *H.F. and others v. France*, op. cit., parr. 191-192. *Al-Saadoon and Mufdhi v. United Kingdom* of 2 May 2009, par. 88. *Hassan and others v. France* of December 2014, par. 39.

exceptional, these can integrate the initiation of procedures whose object is to deny repatriation⁴⁴. For the ECtHR the speech was more precise and concrete arriving at the connection between extra-territorial jurisdiction and the criterion of citizenship, given that French citizenship is not a connecting criterion which is sufficient to establish the argument of extra-territorial jurisdiction, therefore, the French State should answer to Article 3 ECHR for inhuman and degrading treatments and related control⁴⁵. For this reason the ECtHR declared inadmissible the violation of Article 3 ECHR and the importance it has to do with diplomatic and/or consular protection and the extraterritorial jurisdiction of the French state.

Article 3, par. 2 of the Protocol n. 4 ECHR

The link between the extraterritorial jurisdiction of the France and Article 3, par. 2 of Protocol no. 4 ECHR is immediately distinguished from the relative recognition of “the right to enter

⁴⁴ECtHR, Hassan and others v. France of December 2014, par. 193-196.

⁴⁵ECtHR, Hassan and others v. France of December 2014, par. 198.

the national territory” only to citizens of the State (where Article 3, paragraph 2 of Protocol n. 4 applies), i.e. to individuals who enjoy citizenship and who constitute itself the extraterritorial jurisdiction of France⁴⁶. The ECtHR noted that the French state did not prevent the applicants' relatives from making use of their right. The relevant decision had nothing to do with state prerogatives for crossing a state border such as for example the issuance of trip⁴⁷. Article 3, par. 2 of Protocol no. 4 states that:

“(...) interprétée et appliquée d'une manière qui en rende les garanties concrètes et effectives et non pas théoriques et illusoires (...)”

trying to understand if the concrete situation finds the relatives of the applicants and the jurisdiction *ratione loci* and *personae* of France (Sudre, 2021; Villiger, 2023)⁴⁸.

This tendency interprets the possibility of guaranteeing the existing relationship between the State and its own citizens and the possibility that the law guarantees the existence relationship

46ECtHR, H.F. and others v. France, op. cit., par. 206.

47ECtHR, H.F. and others v. France, op. cit., par. 207.

48ECtHR, Airey v. Ireland of 6 February 1981, par. 24. N.D. and N.T. v. Spain of 13 February 2020, par. 171.

outside the national territory where the State exercises its effective control⁴⁹. International sources based on the Protocol find interpretation in the preparatory works of the ECHR⁵⁰. If the adoption of the Protocol prohibits contemporary democratic

49N.D. and N.T. v. Spain of 13 February 2020, par. 209.

50According to par. 26 of the Rapport explicatif du Protocole n. 4, in relation to Article 3, par. 2 is affirmed that: “(...) La première modification vient de ce que l’expression “Nul ne peut être privé du droit de” a été substituée aux mots “Toute personne est libre de”. Cette expression s’inspire de celle que l’on trouve à l’article 12, paragraphe 4, du projet de Pacte international adopté par la 3ème Commission de l’Assemblée Générale des Nations Unies. Cette formule a paru mieux correspondre que l’autre à une double préoccupation du Comité:a) D’une part, la disposition du paragraphe 2 n’a pas pour effet de supprimer l’obligation, pour les nationaux qui veulent pénétrer sur le territoire de l’État dont ils sont les ressortissants, de prouver éventuellement leur qualité de ressortissants (L’État n’est pas tenu d’admettre l’entrée sur son territoire d’un individu qui se prétend ressortissant sans faire la preuve de cette qualité.). b) D’autre part, des mesures de caractère temporaire telles que la quarantaine ne doivent pas être considérées comme constitutives d’un refus d’entrée (...)”. (Rapport explicatif du Protocole n. 4, STE-n. 46, Strasbourg, 1963). See also the general observation n. 27 of the International Covenant of Civil and Political Rights, theCommitte of Human Rights affirmed that: “(...) the right of a person to enter his or her own country recognizes the special relationship of a person to that country. The right has various facets. It implies the right to remain in one’s own country. It includes not only the right to return after having left one’s own country; it may also entitle a person to come to the country for the first time if he or she was born outside

principles⁵¹, Article 3, par. 2 is interpreted through a broad spirit of international cooperation for diplomatic and/or consular protection and of human rights (Crawford, 2017; Sudre, 2021)⁵².

The International Court of Justice (ICJ) has already taken into consideration the evolution of international law in terms of

the country (e.g. if that country is the person's state of nationality). The right to return is of the utmost importance for refugees seeking voluntary repatriation. It also implies prohibition of enforced population transfers or mass expulsions to other countries (...)” (UN Human Rights Committee (HRC), CCPR General Comment No. 27: Article 12 (Freedom of Movement), 2 November 1999 (CCPR/C/21/Rev.1/Add.9), par. 19). See also from the Inter American Court of Human Rights (IACtHR), The environment and human rights, Advisory Opinion OC-23/17, 15 November 2017 (The Environment and Human Rights), par. 104 affirmed that: “(...) a person is under the jurisdiction of the State of origin if there is a causal link between the action that occurred within its territory and the negative impact on the human rights of persons outside its territory. The exercise of jurisdiction arises when the State of origin exercises effective control over the activities that caused the damage and the consequent human rights violation (...)”.

51Par. 21 of Rapport explicatif du Protocole n. 4: “(...) La majorité des experts a estimé préférable de ne pas employer le terme “exil” qui est susceptible de donner lieu à diverses difficultés d’interprétation. La notion d’expulsion a été retenue, encore qu’il ait été reconnu que, dans son usage technique normal, ce terme ne s’applique qu’aux étrangers (...)” (Rapport explicatif du Protocole n. 4, STE-n. 46, Strasbourg, 1963).

52Article 2 of Draft articles on Diplomatic Protection adopted on 2006 from the International Law Commission affirmed that: “(...) a State has the right to exercise diplomatic protection in accordance with the present draft

international legal personality of the individual. An evolution that protects the individual (obligation to activate it as a discretionary power) (Vermeer-Kunzli, 2011; Ngoben, 2012; Liakopoulos, 2020)⁵³. An evolution that is also based on the Vienna Convention on consular relations given the interpretation of the ICJ which (especially in articles 5 and 36) confirmed the existence and consular protection as a state basis (Dienelt, 1963, Peters, 2016; Spadaro, 2021)⁵⁴. The situation is very different in

articles (...) and according to Article 19: “(...) A State entitled to exercise diplomatic protection according to the present draft articles, should: (a) give due consideration to the possibility of exercising diplomatic protection, especially when a significant injury has occurred (...)”. https://legal.un.org/ilc/texts/instruments/english/commentaries/9_8_2006.pdf

53ICJ, Barcelona Traction, Light and Power Company, Limited, arrêt, CIJ Recueil 1970, 1-54, spec. 37 and 45. Ahmadou Sadio Diallo (République de Guinée c. République démocratique du Congo), exceptions préliminaires, CIJ Recueil 2002, 1-138, spec. 49.

54ICJ, LaGrand (Allemagne c. États-Unis d’Amérique, arrêt du 27 juin 2001, CIJ Recueil 2001, 466-517, spec. 492; Avena et autres mexicains nationaux (Mexique c. États-Unis), arrêt du 31 mars 2004, CIJ Recueil 2004, 12-70, especially n. 39; Jadhav (Inde v. Pakistan), arrêt du 17 juillet 2019, CIJ Recueil 2019, 418-461, spec. 440. See art. 11 of Decree n. 76-548 of 16 June 1976 relatif aux consuls généraux, consuls et vice-consuls honoraires et aux agents consulaires; the law of n. 2018-336 of 4 May 2018 relatif à la protection consulaire des citoyens de l’Union européenne dans des pays tiers (...). The decision of 29 January 1993, il Conseil d’État

Articles 203⁵⁵, 23⁵⁶ TFUE (Blanke, Mangiamelli, 2021) and 46 CFREU (Kellerbauer, Klamert, Tomkin, 2019)⁵⁷ as well as in Directive no. 637 of 2015 where it is stated that:

“(...) the fundamental right of unrepresented citizens of the Union to enjoy the consular protection of another Member State, under the same conditions as citizens of that State, enshrined in Article 46 of the Charter of Fundamental Rights of the European Union (“Charter”), is an expression of European solidarity⁵⁸. The right to enjoy consular protection (...) affects the discipline of general international law on the matter. The correct interpretation of the Directive must therefore also take into account what is stated in Recital no. 5 of the Preamble (by virtue

affirmed that “les ressortissants des États signataires sont en droit d’attendre protection et assistance des autorités consulaires des États dont ils sont les nationaux en vertu de l’article 5 de la Convention de Vienne, le refus de formuler par l’État français une demande d’aide judiciaire gratuite auprès d’un État étranger au profit d’un de ses ressortissants et de le représenter en justice ne méconnaissait pas les obligations mises à sa charge par cette disposition (...)”.

55See art. 20, par. 2, lett. c).

56See, art. 23, par. 1.

57See, art. 46.

58See Recital 3 in Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA, OJ L 88, 31.3.2017, p. 6-21.

of which it is up to the Member States to establish the methods and forms of protection to be provided to their citizens) (...)” (Vigni, 2010; Vermeer-Künzli, 2011).

Diplomatic and/or consular protection is understood as a main prerogative of the State where it is at the center of the need to respect the fundamental rights of the person at an internal and international level (Edwards, 2014), such as for example national interventions that fight terrorism identifying the balance between the guarantee, freedom and the protection of security according to Article 3, par. 2 of Protocol no. 4. The ECtHR has not excluded the possibility that the extraterritorial jurisdiction of the State according to the principles of Article 1 ECHR characterizes the situation of people held in camps of North-East Syria. This allow for the existence of the extraterritorial jurisdiction of the French state and the application of the criterion of citizenship. The multiple requests for repatriation made by relatives to the national authorities are first of all justified by the very serious dangers that people detained in Syrian camps run. The inhuman and degrading treatments suffered in those places violate the

principle of human dignity and the values at the foundation of democratic societies. The duration and methods of deprivation of liberty, as well as the living conditions already mentioned, made it materially impossible for the applicants' family members to reach the French border and therefore made state intervention necessary⁵⁹.

The considerations arrived at by the judges of Strasbourg allow us to affirm that the French extraterritorial jurisdiction is found with Article 3, par. 2 of the Protocol no. 4. (Sudre, 2021), i.e. an approach that allows development and analysis as established in the context of ECHR.

The individual “right” to repatriation and Article 3, par. 2 of the Protocol no. 4 ECHR

The interpretative approach of the ECtHR was certainly based on Article 3, par. 2 of the Protocol no. 4 ECHR which puts the

⁵⁹ECtHR, H.F. and others v. France, op. cit., par. 213. Khan v. France of 28 February 2019, par. 74. X and others v. Bulgaria of 2 February 2021, par. 197.

relative responsibility of specific obligations on the table⁶⁰. Despite this position, the State cannot expel citizens, extradite them or exile them. This lack of cooperation between other States shows the departure from the spirit of the ECHR and especially of the cooperation between States in criminal matters⁶¹. The recourse to the deprivation of citizenship was also addressed by the Council of Europe in Resolution no. 2263 of 2019⁶².

60ECtHR, *H.F. and others v. France*, op. cit., parr. 244 e 245. see par. 29 of Rapport explicatif du Protocole n. 4: “(...) Le Comité est convenu que la disposition du paragraphe 2 ne pourrait être invoquée qu’à l’égard de l’État dont est ressortissant l’individu victime de la violation de cette disposition (...)”.

61ECtHR; *H.F. and others v. France*, op. cit., par. 247. See also the par. 28 of Rapport explicatif du Protocole n. 4: “(...) Il a été entendu toutefois que le droit pour un individu d’entrer sur le territoire de l’État dont il est le ressortissant ne pourrait être interprété comme conférant à cet individu un droit absolu à demeurer sur le territoire. Par exemple, un délinquant qui, après avoir été extradé par l’État dont il est le ressortissant, se serait évadé d’une prison de l’État requérant n’aurait pas un droit inconditionnel de trouver refuge dans son pays. De même, un militaire en service sur le territoire d’un État autre que celui dont il est le ressortissant n’aurait pas le droit d’obtenir d’être rapatrié pour rester dans son pays (...)”.

62Parliamentary Assembly, Résolution 2263 (2019), La déchéance de nationalité comme mesure de lutte contre le terrorisme: une approche compatible avec les droits de l’homme?:

<http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-FR.asp?fileid=25430&lang=FR>).

Revoking citizenship also means a violation of Article 3, par. 2 of Protocol no. 4 (Sudre, 2021)⁶³ therefore for this reason the ECtHR in the past have stated that:

“(...) the national provisions adopted for the purpose should be assessed in the light of the guarantees offered by art. 8 ECHR first of all that relating to protection against arbitrary decisions (...)”⁶⁴.

Already in the same spirit, the UN High Commissioner for Human Rights has highlighted that the provision for the revocation of citizenship adopted in order to arbitrarily prevent the repatriation of the citizen affected by the measure, violated the same⁶⁵. He excluded that it could be used to cause damage to a third country (Lauterpacht, 1927; Preuss, 1935; Williams, 1974; Lepoutre, 2016). States provide for the revocation of citizenship without applying various limits (Spadaro, 2021). The conventional legal basis of the repatriation power also includes

⁶³ECtHR, Naumov v. Albania, op. cit.

⁶⁴ECtHR, K2 v. United Kingdom, op. cit.; Ghoumid and others v. France, op. cit. Usmanov v. Russia, op. cit.; Hashemi and others v. Azerbaïdjan, op. cit.

⁶⁵UN Human Rights Committee (HRC), CCPR General Comment No. 27: Article 12 (Freedom of Movement), op. Cit.

obligations of connection (Ben-Naftali, Shany, 2003; Milanovic, 2011)⁶⁶.

According ex novo to the ECtHR Article 3, § 2, of Protocol no. 4 places various obligations on the State, first of all those just mentioned above; however, it is not easy to clearly identify which measures or behaviors can reduce the “right” to repatriation to the point of violating the provision⁶⁷. Identifying the positive obligations imposed on the State, it will inevitably vary

“en fonction de la diversité des situations dans les États contractants et des choix à faire en termes de priorités et de ressources”. Ces obligations ne doivent pas être interprétées de manière à imposer aux autorités un fardeau insupportable ou

⁶⁶According to Milanovic: “(...) different obligations stem from different exercises of extraterritorial jurisdiction: “(...). See also: UN Human Rights Committee (HRC), CCPR General Comment No. 36: Article 6 (Right to life), 30 October 2018 (CCPR/C/GC/36), par. 63. General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 26 May 2004 (CCPR/C/21/Rev.1/Add.13), par. 10; Kindler v. Canada, Comm No 470/1991, 25 September 1991 (CCPR/C/48/D/470/1991), par. 6.1. Chitat Ng v Canada, Comm No 469/1991, 5 November 1993 (CCPR/C/49/D/469/1991), par. 6.2.

⁶⁷ECtHR, H.F. and others v. France, op. cit., par. 250.

excessif (...)”⁶⁸.

Limits to state obligations of Article 3, par. 2 of Protocol no. 4 ECHR

The ECHR lays the foundations for Member States to effectively exercise the power of return for their citizens. Citizens cannot achieve full autonomy at the border. Both the ECtHR and the established jurisprudence have regulated the right for diplomatic and/or consular protection⁶⁹ for the protection of human rights especially in our case in the Syrian camps despite the related investigations of the UN Council for Human Rights⁷⁰. The legal basis of the Vienna Convention establishes the exercise of consular protection as a right. According to the statements of the ECtHR:

“(...) les droits que tirent les ressortissants en difficulté ou détenus à l'étranger des articles 5 et 36 de la Convention de Vienne ne sont opposables qu'à l'“État de résidence” et cette

⁶⁸ECtHR, H.F. and others v. France, op. cit., par. 251-252.

⁶⁹ECtHR, M. and others v. Italy and Bulgaria of 31 July 2012, par. 127.

Mediterraneum joint-venture and others v. Italy of 29 April 2008.

⁷⁰Par. 258.

protection résulte en principe d'un dialogue entre ce dernier et les autorités consulaires (de l'État d'envoi) sur place (...) Les personnes retenues, comme les proches des requérants, dans les camps contrôlés par un groupe armé non étatique et dont l'État de nationalité n'a pas d'agent consulaire en Syrie ne sont donc pas, en principe, éligibles à réclamer un droit à l'assistance consulaire (...)»⁷¹.

Certainly the limits as obstacles are many given that we take into account that there is no rule of international law of the EU that forces States to repatriate their citizens for a political position that is favorable to various possibilities⁷² as the ECtHR itself states:

“(...) les citoyens français retenus dans les camps du nord-est de la Syrie ne sont pas fondés à réclamer le bénéfice d'un droit général au rapatriement au titre du droit d'entrer sur le territoire national garanti par l'article 3 § 2 du Protocole no 4 (...) droit individuel à la protection diplomatique qui irait à l'encontre du droit international et du pouvoir discrétionnaire des États (...)”⁷³.

The ECtHR has considered the content and spirit of ECHR as a binding target for States that respect fundamental rights. With greater protection to the particularities of concrete cases Article 3, par. 2 of Protocol no. 4 establishes the positive obligations

⁷¹Par. 256.

⁷²Par. 258.

⁷³Par. 259.

towards the head of the State where he refuses to undertake initiatives that ensure the repatriation of citizens configured as a de facto situation in exile⁷⁴. The ECtHR has tried to monitor and verify situations of this type. Verification for the relatives of the applicants who are faced as exceptional circumstances and entail the obligation for the State to guarantee them the effective power of the right to return. The provision where the State expresses its denial to this type of initiative does not ensure repatriation results in arbitrariness⁷⁵.

ECtHR in fact recognized the situation of the relatives of the applicants and for this reason the judges ensure the obligation to guarantee French citizens the concrete exercise of the power to repatriate⁷⁶. The related documents, declarations and international and regional organizations thus invite the other European States to maintain a similar attitude to repatriation towards their own citizens detained in the Syrian camps⁷⁷. The inclusive notion of

⁷⁴ECtHR, H.F. and others v. France, op. cit., par. 260.

⁷⁵Par. 263.

⁷⁶Parr. 265-270.

⁷⁷United Nations Committee Against Torture (CAT), Communication No. 922 of 2019 (G/SO 229/31 FRA), 24 March 2020, §35; Report of the Special

the exceptional circumstances concerns individuals who are vulnerable given their young age. The ECtHR has taken into consideration what was pre-established by the UN Committee on the Rights of the Child months before the relative sentence under examination⁷⁸. The Committee was of the opinion that the complaints from relatives of children of French nationality who

Rapporteur on the promotion and protection of human rights and fundamental freedoms in the fight against terrorism (A/HRC/40/52/Add.4), 8 May 2019, §§47 and 61-62; Statements of 21 May 2019, 4 November 2019 and 29 March 2021 by the Executive Director of UNICEF ((UNICEF/UN029014).

78The Committee affirms that: “(...) The obligations of States parties under the Conventions apply to each child within their jurisdictions, including the jurisdiction arising from a State exercising effective control outside its borders. Those obligations cannot be arbitrarily and unilaterally curtailed either by excluding zones or areas from the territory of a State or by defining particular zones or areas as not or only partly under the jurisdiction of the State, including in international waters or other transit zones where States put in place migration control mechanisms. The obligations apply within the borders of the State, including with respect to those children who come under its jurisdiction while attempting to enter its territory (...)”, Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration ((CMW/C/GC/3-CRC/C.GC/22), par. 12.

were being held in Syrian camps which were rejected by the French state because there were suspicions of the parents' collaboration with ISIS⁷⁹ resulted in the adoption of the Communication of 23 February 2022 which condemned France for not intervening in relation to the importance that the guarantee and protection of minors had for the French State as enshrined in Article 3 of the New York Convention, i.e. the fundamental principle for the response to a repatriation request (Doek, 2022)⁸⁰. The subjects involved asked France's authorities

⁷⁹Communication CRC/C/86/D/R.77/2019 (parr. 8.6, 8.7, 8.8, 8.9), CRC/C/85/D/79/2019 and CRC/C/85/D/109/2019.

⁸⁰CDE, Constatations adoptées par le Comité au titre du Protocole facultatif à la Convention relative aux droits de l'enfant établissant une procédure de présentation de communications, concernant les communications nos 77/2019, 79/2019 et 109/2019, 23 February 2022: "(...) Au vue de tout ce qui précède, et dans les circonstances particulières des cas d'espèce, le Comité conclut que le fait que l'État partie n'ait pas protégé les enfants victimes constitue une violation des leurs droits en vertu des articles 3 et 37 (a) de la Convention et que le manquement de l'État partie à protéger les enfants victimes contre une menace imminent et prévisible à leurs vies constituerait une violation du paragraphe 1 de l'article 6 de la Convention (...)". (parr. 6.11): [CRC/C/89/DR/77/2019-](#) [CRC/C/89/DR/79/2019 \(ohchr.org\)](#). OHCHR, France violated rights of French children detained in Syria by failing to repatriate them, UN committee finds, 24 February 2022: <https://www.ohchr.org/en/press-releases/2022/02/france-violated-rights-french-children-detained-syria-failing-repatriate>

to guarantee the effectiveness of the repatriation so the control for France's refusal to follow the requests of the interested parties was not arbitrary. France has ensured a return in part of the minors who were present in the Syrian camps. The lack of a reasoned provision allowed the applicants not to verify the legitimacy of the reasons for the decision which was accepted for their relatives⁸¹. This French choice based on the individual attempt to balance freedom, guarantee and protection of public safety. For the ECtHR:

“(...) the distinction is decisive for a precise reason: one thing are the political choices made within the counter-terrorism strategy, which “par leur nature même” cannot be reviewed by the Court; another, are those measures which have a direct bearing on the rights protected by the ECHR (...)”⁸².

This type of statement forms the object of an individual investigation which is based on the control of an independent body, even of a non-judicial nature⁸³. This type of control falls

81ECtHR, H.F. and others v. France, op. cit., parr. 279-280.

82ECtHR, Tagayeva and others v. Russia of 13 April 2017, parr. 481.

83ECtHR, Ghoumid and others, op. cit., parr. 44 and 47. Beghal v. United Kingdom of 28 February 2019, parr. 88. K2 v. United Kingdom, op. cit., parr. 49-50 and 54-61.

within the assessment of application in the second category⁸⁴.

In this spirit, other factors are also noted such as, for example, the repatriation request which had to do with the involvement of minors and the decision which respects precise criteria, such as, for example, the celebration of the best interests of the minor and the vulnerability of one's own precise needs. On the other hand, the political nature of every European government, as also in the case of France where the appellants were unable to obtain an answer from the internal jurisdictional bodies⁸⁵, has allowed the ECtHR to express itself in a particular way, above all in expressing itself in the “théorie des actes de gouvernement” and/or to take a position on France's political choices in the face of exceptional situations where the State can deny repatriation for reasons of public interest, for legal, diplomatic or material difficulties, or as a control mechanism in decisions which allows the verification of the non-arbitrariness of this type of choice. The arguments in this regard cannot also clarify the specific cases

84Par. 274.

85Par. 281.

that are part of art. 3, par. 2 of the Protocol no. 4.

Concluding remarks

As we have understood so far the ECtHR has maintained an interpretation of Article 3, par. 2 of Protocol no. 4 (Sudre, 2021), which allowed under certain conditions French citizenship to be linked in a sufficient way with the extraterritorial jurisdiction of France. The exceptional circumstances characterize the situation where the French citizens in the camps of the North-East of Syria, have had the obligation to guarantee the respect of their rights. The State has limited the right of repatriation of its citizens in circumstances where the ECHR imposes on the State the obligation to effectively exercise it. The objectives of the Convention of ECHR are binding on States that respect fundamental rights where the ECtHR stated that:

“(...) faced with exceptional circumstances, each State is required to guarantee its citizens the concrete exercise of the “right” to repatriation (...) which derives from the innovative scope of the ruling. Article 3, § 2, of Protocol no. 4, becomes a

provision having a procedural value, but with evident repercussions on the substantive level”.

This emerges from the exceptional nature of the factual conditions, consequently allowing both to establish the extra-territorial jurisdiction of a State and to impose positive obligations on the part of the State itself, especially where the protection of the rights of vulnerable subjects such as minors is at stake⁸⁶.

Such a contemporary, precise, modern position suffers from the ambiguity connected with the attempts of the ECtHR which protect the rights of foreign fighters and their families, thus avoiding “ouvrir des vannes” excessive burdens for the States given that there is no general right to repatriation from which arises an obligation on the head of state to repatriate his own citizens when he denies an infringement of the rights which are enshrined in the convention. This exceptional statement also extends to the majority of people requesting repatriation. For the ECtHR the State cannot deny the relative repatriation with regard to the legality of a procedural nature. The statements that have to

⁸⁶Par. 282

do with the public interest and the rejection of the repatriation request are explicit to the evaluation of a third party of an impartial nature (Mehra, Wentworth, Thorley, 2022). Let us not forget that the same sentence highlighted obligations of a procedural nature⁸⁷. The substantive obligations of a positive nature fall on the States and allow the identification that has the object of the revocation of citizenship. The absence of indications makes the decision arbitrary. The ECtHR noted on the one hand the exceptional circumstances that arise the positive obligations for each State and on the other hand introduced the notion of arbitrariness which allows States to justify decisions rejecting repatriation requests with related consequences. The de facto exile ends up among the institutions that are not against the convention for a procedure that is adopted.

This statement is not based on Article 3, par. 2 as interpreted by the judges of Strasbourg given that it did not concern decisions which were arbitrary in the Member States and which may

⁸⁷See the dissenting opinion of judges: Yudkivska, Wojtyczek, Roosma, Pavli and Schembri Orland.

violate the conventional rights of their own citizens.

The ECtHR was not based on the central node as happened with judgments in the past but on procedural guarantees where the Member States have denied the relative repatriation to citizens who are suspected of participating in terrorist activities, which respects the procedural guarantees as well as to the members of their own families⁸⁸.

We have the same dilemma for the institution of the “déchéance de la nationalité” where the judges of Strasbourg guaranteed the effectiveness of anti-terrorism measures and the protection of human rights and of fundamental freedoms thus ensuring respect for the principle of complementarity and of mutual reinforcement. Denying a right and above all the right to repatriation means in practice a form of exile. The ECtHR went even further by accepting that the choices of a political nature that have been adopted in France in recent years and above all in the sector of the counter-terrorism strategy seem like a trap to a

⁸⁸See the opinions of the judges: Pavli and Schembri Orland.

consensus where one's legitimacy contributes to an interpretative identification that based on state responsibility. Article 3, par. 2 of the Protocol no. 4 (Sudre, 2021) presents itself as a useful tool for the defense of human rights towards subjects who are vulnerable according to ECtHR, i.e. for children⁸⁹ and their own mothers and for women⁹⁰. The sentence has intensified, monitored the repatriation policies of minors and their families

89UNCRC (2020) Decision adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning communications No. 79/2019 and No. 109/2019, 4 December 2020, UN Doc. CRC/C/85/D/79/2019-CRC/C/85/D/109/2019 (2020) (L.H. et al v. France): On 30 September 2020, the Committee declared L.H. et al v. France admissible, which was promptly followed on 4 February 2021 with a similarly reasoned decision in UNCRC 2021a (F.B. et al v. France). UNCRC (2015) Concluding Observations of the Committee on the Rights of the Child: Switzerland, 26 February 2015, UN Doc. CRC/C/CHE/CO/2-4, para 22; UNCRC (2012) Concluding Observations of the Committee on the Rights of the Child: Australia, 28 August 2012, UN Doc. CRC/C/AUS/CO/4, para 28.a.

90See the Resolutions of the UN: S/RES/1373 (2001), par. 4 and 6 of S/RES/2178 (2014) of 24 September 2014 and par. 31 of S/RES/2396 (2017) of 21 December 2017. S/2015/939 of 3 December 2015:

https://www.un.org/securitycouncil/ctc/sites/www.un.org.securitycouncil.ctc/files/files/documents/2021/Jan/madrid-guiding-principles_fr.pdf.

detained in the north-eastern part of Syria⁹¹. Living in these areas and above all having minors live in camps shows a greater risk of radicalisation⁹², a danger which confirms that the phenomenon of foreign fighters becomes an area of experimentation for a strategic policy of terrorism which has as its objective the

91See ex multis: [Northwest-Maaret-Tamsrin-IDP-Camps-and-Informal-Settlements-Flood-Simulation-Report-Syria--May-2022.pdf](#) (impact-initiatives.org). [when_am_i_going_to_start_to_live_final_0.pdf](#) (resource-centre-uploads.s3.amazonaws.com). [United Nations Resident Coordinator and Humanitarian Coordinator in Syria, Imran Riza, statement on visit to north-east Syria \[EN/AR\] - Syrian Arab Republic | ReliefWeb](#). [United Nations Resident Coordinator and Humanitarian Coordinator in Syria, Imran Riza, statement on visit to north-east Syria \[EN/AR\] - Syrian Arab Republic | ReliefWeb](#). [Speed up repatriations or foreign children could be stuck in North East Syria camps for up to 30 years, warns Save the Children - Syrian Arab Republic | ReliefWeb](#). See also the Report of the Independent International Commission of Inquiry on the Syrian Arab Republic of 8 February 2022 which is affirmed that: “(...) depriving individuals, including children, with alleged links to Da’esh [...] of liberty without criminal charge or any individual assessment by an impartial and independent body as to whether their internment is justified on grounds of imperative reasons of security is unlawful (A/HRC/48/70, paras. 110–112) (...)” (General Assembly, Human rights situations that require the Council’s attention Report of the Independent International Commission of Inquiry on the Syrian Arab Republic (A/HRC/49/77), par. 112. Speed up repatriations or foreign children could be stuck in North East Syria camps for up to 30 years, warns Save the Children, 23 March 2022.

92EC, Repatriated foreign terrorist fighters and their families: European experiences & lessons for P/CVE, 2021: [ran_ad-](#)

protection, public security and the repatriation of fighters and their families towards an integration into their own society. A path that seems to have been undertaken seriously by the EU in recent years without however yet seeing precise results for the greater protection of women and children⁹³.

[hoc_repatriated_ftfs_june_2021_en.pdf\(europa.eu\)](#)

93Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions. A Counter-Terrorism Agenda for the EU: Anticipate, Prevent, Protect, Respond, COM/2020/795 final.

References

- Alix, J. (2017). La lutte contre le terrorisme entre prévention pénale et prévention administrative, in M. Touillier (sous la direction). *Actes du colloque: Le Code de la sécurité intérieure, trois ans après: artisan d'un nouvel ordre ou semeur de désordre?*, Paris.
- Alix, J., Cahn, O. (2017). Mutations de l'antiterrorisme et émergence d'un droit répressif de la sécurité nationale. *Revue de Science Criminelle et de Droit Pénal Comparé*, 4, 845-868.
- Arielli, N. (2020). Foreign fighters and war volunteers: Between myth and reality. *European Review of History*, 27(1-2), 57ss.
- Bakke, K.M. (2014). Help wanted? The mixed record of foreign fighters in domestic insurgencies. *International Security*, 38, 150-187.
- Basra R., Neumann, P. (2016). Criminal pasts, terrorist futures: European jihadists and the new crime-terror nexus. *Perspective on Terrorism*, 10(6).
- Ben-Naftali, Shany, Y. (2003). Living in denial: The application

of human rights in the occupied territories. *Israel Law Review*, 37 (1), 17-118.

Bergema, R., San, M. (2019). Waves of the black banner: An exploratory study on the Dutch Jihadist foreign fighter contingent in Syria and Iraq. *Studies in Conflict & Terrorism*, 47, 638ss.

Beritasatu, (February, 2020, 12). Indonesia refuses to repatriate former Islamic State fighters. *Jakarta Globe*: <https://jakartaglobe.id/news/indonesia-refuses-to-repatriate-former-islamic-state-fighters>;

Bilková, V. (2018). Foreign terrorist fighters and international law. *Groningen Journal of International Law*, 6, 4ss.

Blanke, H.J., Mangiamelli, S. (2021). *Treaty on the Functioning of the European Union. A commentary*. ed. Springer, Berlin.

Blisson, L. (2017). Risques et périls de l'association de malfaiteurs terroriste. *Délibérée*, 2, 16-20.

Bolhuis, M.P., Van Wijk, J. (2020). Citizenship deprivation as a counterterrorism measure in Europe; Possible follow-up scenarios, human rights infringements and the effect on

counterterrorism. *European Journal of Migration and Law*, 22, 338-365.

Bures, O. (2020). EU's response to foreign fighters: New threat, old challenges?. *Terrorism and Political Violence*, 32, 789-806.

Byman, D (2019). *Road warriors: Foreign fighters in the armies of Jihad*. Oxford University Press, Oxford, New York, 8ss.

Cahn, O. (2016). "Cet ennemi intérieur, nous devons le combattre". Le dispositif antiterroriste français, une manifestation du droit pénal de l'ennemi. *Archives de Politique Criminelle*. 38 (1), 92ss.

Catelan, N. (2015). Conformité de la déchéance de nationalité applicable aux terroristes. *Revue Française de Droit Constitutionnel*, 103, 715-720.

Charbord, A., Birker, M., Taylar, L., Foa, M., Crespin, P. (2020, February, 12). Repatriation of foreign terrorist fighters and their families from conflict zones in Syria and Iraq, Conference Report. *OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR)*: <https://www.osce.org/odihr/453048?>

[download=true;](#)

Chassang, C. (2015). Constitutionnalité de la déchéance de nationalité pour acte de terrorisme. *AJ pénal*, 4, 201-202.

Chemel, M. (2019). Les militaires français et le djihad. *CAT*: <http://cat-int.org/wp-content/uploads/2019/12/CAT-Militaires-Djihad.pdf>).

Cools, L. (2020, December, 31). La reconnaissance d'un droit subjectif au rapatriement dans le chef des enfants belges retenus en Syrie: Un grand pas en avant, *Centre Charles De Visscher pour le Droit International et Européen*: <https://tinyurl.com/s3xjd2u>.

Coolsaet, R. (2016, March). Facing the fourth foreign fighter wave: What drives Europeans to Syria, and to islamic State? Insights from the Belgian case. *Egmont. The Royal Institute for International Relations*: <http://www.egmontinstitute.be/facing-the-fourth-foreign-fighters-wave/>, 21.

Crawford, J. (2017). The International Law Commission's Articles on Diplomatic Protection Revisited. In T. Maluwa. *The*

pursuit of a brave new world in international law. Brill & Nijhoff, Bruxelles, Leiden.

Cruickshank, P. (2015, August, 15). A view from the CT foxhole: An interview with Alain Grignard, Brussels Federal Police. *CTC Sentinel*: <https://ctc.westpoint.EDU/a-view-from-the-ct-foxhole-an-interview-with-alain-grignard-brussels-federal-police/>.

Cuyckens, H. (2021). Foreign fighters and the tension between counter terrorism and international humanitarian law: A case for cumulative prosecution where possible. *International Review of the Red Cross*, 103 (916-917), 584ss.

Das, S., Nargas, A. (2018). Mapping the Jadhav dispute at the world court. Evaluating India and Pakistan's arguments. *California Western International Law Journal*, 48 (1), 40ss.

De Groot, G.R., Franssen, P., Harvey, A., Pougnet, R. (2021). Expert opinion: How the Netherlands, France and the UK are leaving children stranded at risk of statelessness in Iraq and Syria. *European Network on Statelessness*: <https://www.statelessness.eu/updates/blog/expert-opinion-how->

[netherlands-france-and-uk-are-leaving-children-stranded-risk.](#)

De Lamy, B. (2017). France. *Revue de Science Criminelle et de Droit Pénal Comparé*, 2, 385-394, 385:
[https://www.cairn.info/revue-de-science-criminelle-et-de-droit-penal-compare-2016- 2-page-393.htm:](https://www.cairn.info/revue-de-science-criminelle-et-de-droit-penal-compare-2016-2-page-393.htm)

Dienelt, A. (1963). Vienna Convention on Consular Relations (1963) (2011). *Max Planck Encyclopedia of Public International Law*, Oxford, par. 8ss.

Doek, J.E. (2022). Individual communications submitted under the under the Optional Protocol to the CRC on a communications procedure and admissibility. *Leiden Scholar Publishers*, n. 2, 11:
[https://hdl.handle.net/1887/3304288.](https://hdl.handle.net/1887/3304288)

Duffy, H. (2018). Foreign terrorist fighters: A human rights approach?. *Security and Human Rights*, 29, 124ss.

Dworkin, A. (2019, March, 31). A tribunal for ISIS fighters?. *ECFR Commentary*:

https://ecfr.eu/article/commentary_a_tribunal_for_isis_fighters/

Edwards, A. (2014). The meaning of nationality in international

law in an era of human rights. In A. Edwards, L. Van Waas (eds.). *Nationality and statelessness under international law*. Cambridge University Press, Cambridge, 35.

Flores, M. (2016). Fighters involvement in national and international wars: A historical survey. In A.D. Guttry, F. Capone, C. Paulussen. *Foreign fighters under international law and beyond*. ed. Springer, Pisa, The Hague, 27-47.

Geisser, V. (2015). Déchoir de la nationalité des djihadistes “100 % made in france”: qui cherche-t-on à punir?. *Migrations Société*, 6 (162), 3-14.

Gibney, M. (2013). A very transcendental power: Denaturalisation and the liberalisation of citizenship in the United Kingdom. *Political Studies*, 61, 637-655.

Hegghammer, T. (2010). The rise of Muslim foreign fighters: Islam and the globalization of Jihad. *International Security*, 35, 53, 57-58, 94.

Hegghammer, T. (2016). The future of jihadism in Europe: A pessimistic view. *Perspective on Terrorism*, 10(6), 158ss.

Holman, T. (2016). Why states fail to counter foreign fighter mobilizations: The role of intelligence services. *Perspectives on Terrorism*, 10 (6), 140-155.

Jawaid, A. (2017). From foreign fighters to returnees: The challenges of rehabilitation and reintegration policies. *Journal of Peacebuilding & Development*, 12, 102-107.

Kellerbauer, M., Klamert, M., Tomkin, J. (2019). *Commentary on the European Union treaties and the Charter of fundamental rights*. Oxford University Press, Oxford.

Kington, T. (2019, May, 8): 45,000 Children of Isis “Are ticking time bomb”. *The Times*: www.thetimes.co.uk/article/45-000-children-of-isis-are-ticking-time-bomb-lp0nq9q2m;

Krähenmann, S. (2014). Foreign fighters under international law. Geneva Academy of International Humanitarian Law and Human Rights. *Academy Briefing*, n. 7/2014, 6.

Lagarde, P. (2015). Note sous décision n° 2014-439 QPC. *Revue Critique de Droit International Privé*, 1, 115-125.

Lauterpacht, H. (1927). *The function of law in the international*

community. Oxford University Press, Oxford, 1933, 300-301.

Légier, G. (2014a). *Histoire du droit de la nationalité. Des origines à la veille de la réforme de 1889*, vol. II. LGDJ, Paris, 691-702.

Légier, G. (2014b). La législation relative à la nationalité française durant la Première guerre mondiale. *Revue Critique de Droit International Privé*, n. 4, 751-795.

Lepoutre, J. (2016). Le bannissement des nationaux. Comparaison (France-Royaume-Uni) au regard de la lutte contre le terrorisme. *Revue Critique de Droit International Privé*, 1, 107-118.

Lepoutre, J. (2018a). L'impasse de la déchéance de la nationalité. *Plein Droit*, 117 (2), 20-23.

Lepoutre, J. (2018b). Le bannissement des nationaux. Comparaison (France-Royaume-Uni) au regard de la lutte contre le terrorisme. *Revue Critique de Droit International Privé*, 1, 107-118, 111.

Liakopoulos, D. (2020). *The role of not party in the trial before the International Court of Justice*. ed. Maklu, Antwerp, Portland.

Lopes, M., Dukin, S. (2019, July, 19). Repatriation of foreign terrorist fighters: Cases for the west. *European Eye on Radicalization*: <https://eeradicalization.com/repatriation-of-foreign-terrorist-fighters-cases-for-the-west/>;

Lorne Dawson, L. (2021, February 2021). A comparative analysis of the data on western foreign fighters in syria and iraq: Who went and why?, *The Hague: International Centre for Counter-Terrorism (ICCT)*: <https://www.icct.nl/sites/default/files/2022-12/Dawson-Comparative-Analysis-FINAL-1.pdf>

Lu Philips, R. (2021, March, 30). A tribunal for ISIS fighters. A national security and human rights emergency. *Just Security*: <https://www.justsecurity.org/75544/a-tribunal-for-isis-fighters-a-national-security-and-human-rights-emergency/>.

Macq, C. (2021). Contours et enjeux de la déchéance de la nationalité. *Courrier hebdomadaire du CRISP*, n. 30-31/2021, 5-122: <https://www-cairn-info.unimib.idm.oclc.org/revue-courrier-hebdomadaire-du-crisp-2021-30-page-5.htm>.

Malbrunot, G. (2019, October, 16). Djihadistes: Paris face à

l'urgence en Syrie. Le Figaro. Paris négocie à Bagdad le transfert de ses djihadistes de Syrie. *RTBF.be*: [Paris négocie à Bagdad le transfert de ses djihadistes de Syrie - rtbf.be](https://www.rtbf.be/article/paris-negocie-a-bagdad-le-transfert-de-ses-djihadistes-de-syrie-1014767)

Malet, D. (2013). *Foreign fighters: Transnational identity in civic conflicts*. Oxford University Press, Oxford, 9ss.

Mathieu, X. (2022). Precarious multiplicity: France, “foreign fighters” and the containment of difference. *Cooperation and Conflict*, 57 (3), 18ss.

Mehra, T. (2017, December, 17). Bringing (foreign) terrorist fighters to justice in a post-ISIS landscape. Part I: Prosecution by Iraqi and Syrian Courts. *ICCT Perspectives*: <https://icct.nl/publication/bringing-foreign-terrorist-fighters-to-justice-in-a-post-isis-landscape-part-i-prosecution-by-iraqi-and-syrian-courts/>;

Mehra, T., Paulussen, C. (2019, March, 6). The repatriation of foreign fighters and their families: Options, obligations, morality and long-term thinking. *The Hague: International Centre for Counter-Terrorism (ICCT)*: <https://icct.nl/publication/the->

[repatriation-of-foreign-fighters-and-their-families-options-obligations-morality-and-long-term-thinking/](#).

Mehra, T., Wentworth, L.L.M.M., Thorley, A. (2022, September, 16). The European Court of Human Rights sitting on the fence?: Its ruling and impact on the repatriation of European children from North-East Syria. *The Hague: International Centre for Counter-Terrorism (ICCT)*: <https://icct.nl/publication/european-court-of-human-rights-ruling-impact-on-repatriating-european-children-from-northeast-syria/>.

Metodieva, A. (2018). Balkan foreign fighters are coming back: What should be done?, *Strategic Policy Institute-STRATPOL*: https://www.stratpol.sk/wp-content/uploads/2018/01/Metodieva_Returnees_Western_Balkans_Stratpol_FINA_L.pdf.

Milanovic, M. (2011). *Extraterritorial application of human rights treaties: Law, principles, and policy*. Oxford University Press, Oxford, 210-215.

Moore, C. (2015). Foreign bodies: Transnational activism, the

insurgency in the North Caucasus and “beyond”. *Terrorism and Political Violence*, 27, 395-415.

Moore, C., Tumelty, P. (2008). Foreign fighters and the case of Chechnya: A critical assessment. *Studies in Conflict & Terrorism*, 31, 412-433.

Neumann, P.R. (2016). *Radicalized: New jihadists and the threat to the West*. I.B. Tauris, London, 88-89.

Ngobeni, L. (2012). Barcelona Traction and Nottebohm revisited. Nationality as a requirement for diplomatic protection of shareholders in South Africa law: Notes and comments. *Yearbook of International Law*, 37, 172ss.

Organization for Security and Co-operation in Europe, (February, 2020, 11). Repatriation of “Foreign Terrorist Fighters” and Their Families Urgently Needed to Safeguard Human Rights and Security. *OSCE Human Rights Head Says*: www.osce.org/odihr/445909;

Peters, A. (2016). *Beyond human rights: The legal status of the individual in international law*. Cambridge University Press,

Cambridge, 349ss.

Pijnenburg, A. (2022, October, 14). HF and others v France: Extraterritorial jurisdiction without duty to repatriate IS-children and their mothers. *EJIL: Talk*: <https://www.ejiltalk.org/hf-and-others-v-france-extraterritorial-jurisdiction-without-duty-to-repatriate-is-children-and-their-mothers/>

Pokalova, E. (2019). *Returning islamist foreign fighters: Threats and challenges to the West*. ed. Springer, Cham.

Poncela, P. (2016). Les naufragés du droit pénal. *Archives de Politique Criminelle*, 38 (1), 7-26.

Preuss, L. (1935). International law and deprivation of nationality. *Georgetown Law Journal*, 23, 270-271.

Rainey, B., Wicks, W., Ovey, C., (2021). *Jacobos, White and Ovey: The European Convention on Human Rights*. Oxford University Press, Oxford.

Rigotti, C., Barboza, J. (2021). Unfolding the case of returnees: How the European Union and its member States are addressing the return of foreign fighters and their families. *International*

Review of the Red Cross, 103 (916-917), 684ss.

Rongé, J.L. (2015). Déchéance: à propos du projet de révision constitutionnelle concernant les binationaux condamnés pour terrorisme. Du sentiment renforcé d'être différent. *Journal du Droit des Jeunes*, 10 (350), 10ss.

Saas, C. (2016). Menace à l'ordre public: quand l'extranéité l'emporte sur le droit pénal. *AJ pénal*, 1, 1-13.

Saul, B. (2019). Terrorism and international humanitarian law. In B. Saul (eds.). *Research handbook on international law and terrorism*. ed. Edward Elgar, Cheltenham.

Scherrer, A. (eds). (2018, 31). The return of foreign fighters to EU soil: Ex-post evaluation, *European Parliament Research Service*: [https://www.europarl.europa.eu/RegData/etudes/STUD/2018/621811/EPRS_STU\(2018\)621811_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2018/621811/EPRS_STU(2018)621811_EN.pdf).

Schmid, A.P., Tinnes, J. (2015). Foreign (terrorist) fighters with IS: A European perspective. *The Hague: International Centre for Counter-Terrorism (ICCT)*, n. 8/2015, 34:

<http://icct.nl/app/uploads/2015/12/ICCT-Schmid-Foreign->

[Terrorist-Fighters-with-IS-A-European-Perspective-December2015.pdf.](#)

Schmidinger, T. (2018). *Rojava: Revolution, war and the future of Syria's kurds*. Pluto Press, London.

Spadaro, A. (2021). Repatriation of family members of foreign fighters: Individual right or State prerogative?. *International and Comparative Law Quarterly*, 70 (1), 251-265, 260-263.

Stroobants, J.P. (2021, March, 5): La Belgique va rapatrier les enfants de djihadistes détenus en Syrie. *Le Monde*: <https://tinyurl.com/f9rca9m8>;

Sudre, F. (2021). *La Convention européennes des droits de l'homme*. PUF, Paris.

Sureau, F. (2011). La déchéance de la nationalité: deux catégories de Français?. *Études*, 414, n.4, 475-448.

Vermeer-Kunzli, A. (2011). The subject matters: The ICJ and human rights, rights of shareholders, and the Diallo case. *Leiden Journal of International Law*, 24 (3), 608ss.

Vermeer-Künzli, A. (2011). Where the Law Becomes Irrelevant:

Consular Assistance and the European Union. The *International and Comparative Law Quarterly*, 60 (4), 965-995.

Vigni, P. (2010). Diplomatic and Consular Protection in EU Law: Misleading combination or creative solution?. *EUI Working Papers, European University Institute, Department of Law*, n. 11/2010.

Villiger, M.E. (2023). *Handbook on the European Convention on Human Rights*. ed. Brill, Bruxelles.

Vinopal, C. (2019, April, 5). Should thousands of ISIS fighters and their families be allowed to return home?. PBS: <https://www.pbs.org/newshour/world/should-thousands-of-isis-fighters-and-their-families-be-allowed-to-return-home;>

Weil, P. (2005). *Qu'est-ce qu'un Français? Histoire de la nationalité depuis la Révolution*. ed. FOLIO Histoire, Paris, 392-400.

Weill, S. (2018). French foreign fighters: The engagement of administrative and criminal justice in France. *International Review of the Red Cross*, 100 (907-909), 211-237.

Widagdo, S., Indrayanti, K.W., Saraswati, A.A.A.N. (2021). Repatriation as a human rights approach to State options in dealing with returning Isis foreign terrorist fighters. *International Review of the Red Cross*, 11(3), 4ss.

Williams, J.F. (1974). Denationalization. *British Yearbook of International Law*, 8, 45-61, spec. 56-57, 61.

Zubeda, L., Davies, L. (2016). Addressing the foreign terrorist fighter phenomenon from a human rights perspective. *International Community Law Review*, 18, 483-493, spec. 486.